

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL ORDER

EMERGENT RELIEF

OAL DKT. NO. EDS 07235-16

AGENCY DKT. NO. 2016/24429

CLIFTON BOARD OF EDUCATION,

Petitioner,

v.

I.Y. AND M.Y. ON BEHALF OF D.Y.,

Respondents.

Jessica Kleen, Esq., appearing for petitioner (Machado Law Group, attorneys)

I.Y. and **M.Y.**, pro se

Record Closed: May 23, 2016

Decided: May 25, 2016

BEFORE: **CARIDAD F. RIGO**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Clifton Board of Education filed an application for emergent relief seeking an order permitting it to provide home instruction, a psychiatric evaluation and an interim alternative educational setting for the remainder of the 2015-2016 school year.

The matter was transmitted to the Office of Administrative Law (OAL) on May 13, 2016, for a hearing on an expedited basis. A hearing was held on May 23, 2016, at the OAL and the record was closed on the same day.

ISSUE

Has petitioner met the standards for emergent relief as set forth at N.J.A.C. 1:6A-12.1. Should petitioner be permitted to complete a psychiatric evaluation on student D.Y.? And, should petitioner be permitted to place the student in an interim alternative education setting until the end of the 2015-2016 academic year?

FACTUAL DISCUSSION

Based upon the submissions and testimony submitted by the parties, I **FIND** that:

D.Y. is a six year old special education student in petitioner's school district. D.Y. has a significant history of disciplinary problems at school.

The district convened an IEP meeting in October 2015, and proposed a self-contained program designed to meet the significant behavioral needs of D.Y. in a small class environment. This proposed IEP was rejected by the parents who filed a petition for due process. The due process petition was amicably resolved and the parties entered into a settlement agreement. The settlement agreement does not allow for D.Y. to be moved to a self- contained behavioral program. Instead, petitioner is to provide D.Y. with a 1:1 aide and he remained in his general education classes. Petitioner claims that even with a 1:1 aide D.Y.'s needs are not being met. Petitioner presents that D.Y. is in need of a more structured, behavioral disabilities setting. His behavior prevents him from learning. Since September D.Y. has been involved in more than 80 separate incidents of misbehavior, aggression, attempts to self- inflict injury, abuse of staff, teachers and other students.

Summary of Testimony

Luginda Batten-Walker, E.D.D.

Dr. Walker is the principal at School #15 in Clifton. She testified that D.Y. is a student at her school and he has been so since kindergarten, he is now in the first grade. Dr. Walker stated that last year D.Y. exhibited some behavior problems but this year it has gotten worse. Since September of 2015 almost every day D.Y. has an incident that requires her attention and the attention of numerous other teachers and/or staff members.

Dr. Walker described numerous incidents wherein D.Y. becomes uncontrollable and no manner of intervention calms him down. She described D.Y. as very volatile whereby no one can tell what occurred to set him off. She said sometimes he just comes to school angry. D.Y. yells, screams, can be verbally abusive to teachers, staff and other students. He has banged his head on the concrete floor, has bitten himself and has attempted to bite the staff, he has thrown things such as his shoes at the staff, he has run in and out of the classrooms, he has tried to hurt himself the staff and other students. Once he said that he was going to school and shoot everyone at the school and made the gesture of pointing a gun at people.

Academically, Dr. Walker stated that D.Y. may complete one assigned academic task a day. She said D.Y. takes a lot of time and that other students get scared when he screams and yells and becomes upset. Dr. Walker stated that his current school environment does not meet his needs. He needs more than just a 1:1 aide.

Dr. Walker concluded by stating that D.Y.'s inability to follow classroom procedures and teacher instructions, his lashing out verbally and physically, his inability to control himself even with the assistance of a behavioral analyst, two paraprofessionals, a teacher and herself makes D.Y. unavailable for instruction. Dr. Walker stated that D.Y.'s behavior disrupts the entire classroom as well as other classrooms making it impossible for the teachers to teach and the students to learn.

Stasia Hansen

Stasia Hansen is a board certified behavioral analyst (BCBA) and is employed by the Clifton Board of Education. Ms. Hansen testified that she began working with D.Y. last year when he was in kindergarten. She established a behavior plan for him that was implemented this past September. However, the plan she implemented has not worked. Hansen stated that a major problem with D.Y. is that when he is asked to do something he gets angry. He then begins to scream and yell, becomes vocally and physically disruptive to the point where he has to be removed from the environment.

Hansen testified that most recently D.Y. has been assigned two para-professionals and that has made it better to handle D.Y. when he has an episode. Hansen said that no day between April 26 and May 19, 2016, has been disruption free.

Hansen provided a graph of D.Y.'s disruptive behaviors outlining the nature of the misbehavior, the frequency and its duration. See Exhibit P-21.

LEGAL ANALYSIS

N.J.A.C. 6A:14-2.7(s) provides that emergent relief may be granted if an administrative law judge determines from the proofs that: The petitioner will suffer irreparable harm if the requested relief is not granted; the legal right underlying the petitioner's claim is settled; the petitioner has a likelihood of prevailing on the merits of the underlying claim; and, when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted. Emergent relief may be granted if there exists an issue involving a break in the delivery of services. N.J.A.C. 6A: 14-2.7 (r) (l)i. Such a break has occurred here in view of D.Y's numerous misbehaviors as detailed in Exhibit P-21.

The Individuals with Disabilities Education Act (IDEA) requires New Jersey to effectuate procedures which ensure that all children with disabilities residing in the State have available a Free Appropriate Public Education (FAPE) consisting of special

education and related services provided in conformity with an Individualized Education Plan (IEP). 20 U.S.C. § 1401 (9) and 1412(a)(I).

N.J.A.C. 6A: 14-2.7(b), permits a school district to request a due process hearing seeking authorization to perform an evaluation of a student it determines needs to be evaluated so it may provide that student with an appropriate program or placement.

There has already been a break in the services that the district is to provide to D.Y. Without a psychiatric evaluation the district is at a loss as to what to do next for D.Y. Without this evaluation the district's efforts to provide D.Y. with FAPE are impaired. The parents' refusal to consent to the course proposed by the district exacerbates the district's inability to provide FAPE and D.Y.'s inability to obtain a meaningful education. This I **FIND** is irreparable harm.

The legal right underlying the district's claim is settled. The situation at school with D.Y. warrants a psychiatric evaluation as noted by the testimony of Stasia Hansen about D.Y.'s behaviors. D.Y.'s behaviors must be addressed in order for the district to develop and implement an appropriate program and placement for D.Y.

I **FIND** that there is a likelihood of success on the merits of the district's claims. And, a balance of the equities favors the district.

Therefore, having heard the testimony of the above witnesses, the arguments of the parents, and having reviewed the affidavits and behavior reports, I **CONCLUDE** that there is good cause to **GRANT** the district emergent relief.

ORDER

It is hereby **ORDERED** that petitioner's application for emergent relief be **GRANTED**. D.Y. shall undergo a psychiatric evaluation to determine the exact nature of D.Y.'s needs. The parties are to submit the name and resume of the doctor they propose to conduct the evaluation and this tribunal will decide who that doctor will be. The parties are to make their submissions by no later than Wednesday, May 25, 2016.

And, it is **FURTHER ORDERED** that the petitioner is to place D.Y. in an interim alternative educational setting to include home instruction if it deems appropriate pending a placement or program acceptance.

This decision on application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.

May 25, 2016

DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency

May 25, 2016

Date Mailed to Parties:

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